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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 356.

AMERICAN STEEL AND WIRE COMPANY, PLAINTIFF IN ERROR,

vs.

R. A. SPEED, CLERK OF THE COUNTY COURT OF SHELBY COUNTY, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

AS TO STATEMENT OF CASE.

Counsel for plaintiff in error accepted the statement of the case made by the State supreme court in its entirety as true. No part of the findings of fact by the court was omitted and the statement by the Attorney General, in his brief, that "material facts found by said court" were ignored is not supported by the record (R., pages 165–174). It is true this court will accept the facts as found by the court below and will only consider questions of law arising from its findings. Not so, however, with the conclusions of the court

below, drawn from the facts. If this court was bound by the conclusions reached by that court, it would be futile for the citizen to claim protection under the Constitution of the United States, for no instance can be found where a State supreme court did otherwise than conclude its decision was not in violation of that instrument.

The facts being ascertained, it is for this court to determine, as matter of law, whether plaintiff in error was or was not a merchant, or whether the goods were *in transitu*, or whether the property of plaintiff in error became commingled with the general mass of property in Tennessee, or whether there was a discrimination against plaintiff in error because of the foreign origin of its goods, or whether the assessment against plaintiff in error was or was not in violation of article 1, section 8, subsection 3, of the Constitution of the United States. The Attorney General has simply confused the questions of law and fact and reached the result that this court will not only accept as true the findings of the court below, but will accept its conclusions from the facts as equally obligatory. Suppose from the ascertained facts the supreme court of Tennessee had decided that plaintiff in error was a common carrier, or wholesale dry-goods merchant, or a banker, then, according to the contention of the Attorney General, this court would, as matter of law, reach the same absurd conclusion; and he even goes to the extent of insisting that because the State board of equalization held plaintiff in error was a merchant, its conclusion is binding on all courts, and that, too, when the supreme court of the State has repeatedly held that the judgment of the State board of equalization was only conclusive as to values, and in support of this proposition we

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need not go farther than cite the cases of Grundy County *vs.* Tennessee Coal Company, 94 Tenn., 305, and Ward *vs.* Alsup, 100 Tennessee, 750, the two cases cited in his brief.

WAS PLAINTIFF IN ERROR A MERCHANT?

Nothing need be added to the brief of counsel for plaintiff in error on this subject, as all the statutes bearing on the subject are therein fully set out, together with the decisions of the supreme court of the State. It may confidently be asserted that prior to the decision of the supreme court of Tennessee in this case it has never held that a manufacturer was a merchant because he sold his manufactured products. The Attorney General places much reliance on the case of Kurth *vs.* State, 86 Tenn., 134, but when this case is considered it will be found that it does not sustain his contention. Article 2, section 30, of the State constitution provides that "no article manufactured out of the produce of this State shall be taxed otherwise than to pay inspection fees." As already shown in the brief for plaintiff in error, article 2, section 28, of the State constitution provides for an ad valorem tax on merchant's property, and also a privilege or occupation tax, but the privilege tax does not extend to goods sold beyond the limits of the State.

The supreme court of the State in the case of Merchants of Memphis *vs.* The City of Memphis, 9th Baxter, 76, in construing this section has drawn the distinction between a merchant's ad valorem and a merchant's privilege tax. One is a tax on property and the other is a tax on

the occupation. This rule is well understood in Tennessee. In the case now under discussion the clerk assessed an ad valorem tax on all the property of plaintiff in error and then a privilege or occupation tax on 10 per centum of its property, it being shown by the proof that the other 90 per centum was sold beyond the limits of the State (R., page 11). Now, in the case of Kurth *vs.* The State, above referred to, the supreme court of Tennessee held that article 2, section 30, had application to an ad valorem tax and did not apply to a privilege or occupation tax. Consequently a manufacturer of whiskey might be required to pay a dealer's license for selling his product in less quantities than a quart, but could not be required to pay an ad valorem tax; so if there is anything in the contention of the Attorney General it applies to only 10 per centum of the tax assessed against the plaintiff in error and not to the remaining 90 per centum, which was an ad valorem or property tax. It will be observed that the court in Kurth *vs.* State went very far in its interpretation of article 2, section 30, of the State constitution in order to prevent every manufacturer of intoxicating liquors from becoming a tippler. In the case of Taylor *vs.* Vincent, 80 Tenn., 382, the supreme court had held that a manufacturer of liquors might sell at his place of business his manufactured products in unbroken packages and was not liable to pay a tax as a dealer, but could claim exemption under said section. The only modification of this case is to be found in Kurth *vs.* The State, where it is held that where a manufacturer of intoxicating liquors from the produce of the State sells his products in less quantities than a quart, he thereby becomes a tippler or dealer and may be required to pay a license as such.

But there is another contention made by the Attorney General to which particular attention is invited. It is very plain that article 2, section 30, of the State constitution has reference to the manufactured product in the hands of the manufacturer, and does not apply where it has passed into the hands of some one else. It will be observed that the learned judge who delivered the opinion of the supreme court in this case inadvertently says: "The vital fact is that the goods were not sold from their place of manufacture." The Attorney General in his brief (page 9) says article 2, section 30, of the constitution of Tennessee has been before the supreme court of that State in a number of cases, and it has been uniformly decided that the exemption therein provided applies to the manufactured article in the hands of the manufacturer "*at his place of business*," and he italicises the words "*at his place of business.*" There is absolutely no warrant for this contention, except it was held, in Taylor vs. Vincent, that a manufacturer of liquors made of the produce of Tennessee, who held the same for sale in unbroken packages at his place of business, is not liable for the tax on dealers. The court in this case simply limited its decision to the exact facts presented, and because the goods happened to be sold in that case from the manufacturer's place of business by no means justifies the conclusion that if he had sold them elsewhere than at his place of business his products would have been subject to taxation. No other decision is cited in support of this contention, and in the nature of the case it cannot be maintained. On page 16 of the brief of plaintiff in error subsection 5 of section 2 of the assessment law is set out, which expressly provides that the exemption extends "to manufactured articles from

the produce of this State in the hands of the manufacturer," but nowhere does it say "at his place of business;" and if it had said so, it would have been a plain violation of the constitutional provision referred to. To hold that articles manufactured out of the produce of the State are only exempt as long as they remain at the manufacturer's place of business, but are taxable as soon as he sends them to market and offers them for sale, would render article 2, section 30, abortive as a provision to encourage manufactories in Tennessee.

WAS THE TAX DISCRIMINATORY?

The Attorney General seems to discredit the learned opinion of the supreme court of Tennessee in the case of Bennett *vs.* Davidson County, which is set out in full in the brief of counsel for plaintiff in error. He says the case has "never been officially reported." In this connection it would not be amiss to add that he is himself the reporter, and to suggest that perhaps the opinion has not met with his official approval. This case is conclusive of the discriminatory character of the assessment. The Attorney General fails in his effort to differentiate the case under discussion from that of Bennett *vs.* Davidson County. This court is asked to hold that plaintiff in error is a merchant and not a manufacturer simply because it sells its manufactured products, but in case this court decides otherwise it is urged to hold that the goods of plaintiff in error, when assessed, while notwithstanding they were in its "hands," were not at the time "at its place of business," and therefore were for that reason subject to taxation. The plain conclusion which must in-

evitably follow from the facts is that if these goods had been manufactured out of the produce of Tennessee they would have been exempt as long as they remained in the hands of the manufacturer, and this being true, it follows that a tax on goods of plaintiff in error, manufactured by it out of the produce of other States, as long as they are in its hands would be to require it to pay a discriminatory tax because of the foreign origin of its goods. This, at last, is the nature—the substance—of the transaction.

WERE THE GOODS IN TRANSITU?

The fact that two and a half per cent. of all of the goods shipped to Memphis for assortment and distribution were sold to particular customers, or that plaintiff in error availed itself of high water, at convenient seasons, in order to mass its goods at Memphis for distribution, does not alter the case. Substantially all the goods were sold before they reached Memphis, and the substance of the transaction was that the goods started on their journey from the manufactories of the plaintiff in error to be ultimately delivered at the end of their journey to customers who had purchased them, and during the journey they were never offered for sale, were never out of the hands of common carriers, and were only detained at Memphis for assortment and distribution to take place during the life of the contracts under which they were purchased. Stress is laid on the fact that no particular goods were sold to any particular customer; that the title of the goods remained in plaintiff in error until they were delivered, and they were insured by it. It is difficult to see how this could alter the case. Sup-

pose a manufacturer of flour in the Northwest should sell fifty thousand barrels of different grades to be delivered to various customers within ninety days throughout the Southwest, and this flour was assembled in a depot or warehouse at Memphis for assortment and distribution within the life of the contracts of sale. Would it be said that the flour so situated in the hands of a warehouseman and destined for delivery to the purchasers would not be *in transitu*, but, on the contrary, would be commingled with the property of Tennessee in such a way as to become subject to taxation? Would it alter the case to show that no particular barrel of flour was sold to any particular customer? Surely the flour in the case stated would be the subject of interstate commerce and under the protection of the Federal Constitution, and it presents a striking parallel to the case under discussion.

ORIGINAL PACKAGES.

There is no controversy in respect to the character of the packages in which the goods of plaintiff in error were shipped to Memphis and there stored, assorted, and distributed. The contention is that notwithstanding the goods were in the original packages of commerce they had come to a place of rest, had there been offered for sale and had become so mingled with the property of Tennessee as to render them no longer the subjects of interstate commerce and subject to taxation. The findings of the court below conclusively show that practically all these goods were sold before they reached Memphis; that they were not sent there for sale, but for assortment and distribution. The

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findings also conclusively show that in point of fact they were not held out for sale, and were not sold at Memphis. The findings also show that they were not commingled in any respect with the property of Tennessee, but, on the contrary, were stored, separately and apart from all other property, in warehouses rented for that purpose. It is deemed unnecessary to further dwell on the authorities cited in the brief of plaintiff in error. However, in this connection, it is proper to cite the latest deliverance of this court on this subject. In the recent case of The Norfolk and Western Railway Co. *et al.*, plaintiffs in error, *vs.* John R. Sims, sheriff, etc., this court made a ruling which would seem to remove this case from further doubt and controversy. It seems that a manufacturer of sewing machines at Chicago, Illinois, contracted to sell a sewing machine to a party in North Carolina, and the sewing machine was shipped to her to be delivered on the payment of the purchase-money. The title of the sewing machine until payment was made and the machine was delivered remained in the manufacturer just as the title of the goods of plaintiff in error remained in it when they were stored for assortment and distribution at Memphis. After holding that the title of the sewing machine remained in the manufacturer and the machine was the subject of interstate commerce until it was delivered to the purchaser, the court went on further and held that the machine was not subject to taxation because it was an original package of commerce. We quote the language of the court:

"Upon the other hand, for the past seventy-five years and ever since the original case of Brown *vs.* Maryland (12 Wheaton, 419), we have uniformly held that States have

no power to tax directly, or by license, upon the importer goods imported from foreign countries or other States while in their original packages or before they have become commingled with the general property of the State and lose their distinctive character as imports. In that case a law of Maryland required importers to take out a license before they could be permitted to sell their imported goods. That was declared to be void, not only as tax upon imports, but as an infringement upon the power of Congress to regulate commerce. The case is one of the most important ever decided by this court, and has been adhered to by a uniform series of decisions since that time."

The case under discussion falls exactly in this category. The title of the goods remained in plaintiff in error, an importer from another State; they were in the original packages of commerce; they were stored, separately and apart from all other property in Tennessee, in warehouses, and they were so stored, not for sale or to be offered for sale, but solely for the purpose of assortment and distribution. Surely it will not be said that the goods had "lost their distinctive character as imports." Assume that one or one thousand sewing machines had been shipped to North Carolina for sale, each machine having been shipped separately and apart from every other machine in the form of an original package of commerce, and all the machines were stored in a warehouse separately and apart from the other property in North Carolina and held there for assortment and delivery to purchasers in North Carolina, it is very clear that they would be the subjects of interstate commerce and not the subjects of taxation, and yet this is the precise case now presented to the court.

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It is, therefore, confidently submitted that in this aspect of the case the assessment was plainly a violation of the interstate-commerce clause of the Federal Constitution, and for that reason a nullity.

Respectfully submitted.

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